

00880

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

*Handwritten:* H. C. G. Unit  
C. P. P. Unit

**FILE: B-187638**

**DATE: MAR 2 1977**

**MATTER OF: Jack M. Bernstein - Waiver of overpayment**

**DIGEST:** Employee who received erroneous payment of living quarters allowances may not be granted waiver of debt because, in view of employee's lengthy service history, knowledge concerning eligibility for allowances, and information officially provided to him, employee was at fault for failure to inform employing agency of previous denial of living quarters allowance.

This action concerns the appeal of Mr. Jack M. Bernstein of the disallowance by our Claims Division of his application for waiver of the claim by the United States against him for an overpayment of a living quarters allowance in the amount of \$8,298.75. The overpayment was made to Mr. Bernstein while he was a civilian employee of the United States Marine Corps from August 9, 1968, to January 5, 1975. Mr. Bernstein had requested waiver of the claim under the provisions of 5 U.S.C. § 5584.

The record indicates that Mr. Bernstein was employed in Okinawa by the United States Army from October 1, 1947, to October 10, 1951, when he resigned his civilian position to start his own business in Okinawa. At the time of his resignation, Mr. Bernstein was informed of the 1 year limitation on his entitlement to return transportation to the United States at Government expense. Mr. Bernstein terminated his business in July 1955, and on July 7, 1955, was reemployed in Okinawa by the United States Army and erroneously permitted to execute a transportation agreement. In September 1955, he was notified that he was considered locally hired, and therefore ineligible for certain allowances, including the living quarters allowance. Mr. Bernstein's transportation agreement was therefore withdrawn at that time.

In July 1955, Mr. Bernstein wrote to the Department of the Army and to a member of Congress protesting his lack of eligibility for a foreign post differential and other allowances. In response to his inquiries, the Department of the Army, in a letter dated July 23, 1955, cited to Mr. Bernstein and explained in full, civilian personnel

B-187836

laws regulating entitlement to the post differential. The Army further advised him that as a local hire, he was ineligible for the differential, based on the fact that he had resided in Okinawa for almost 4 years prior to his reemployment, during which he was self employed as the owner of his own business.

In December 1965, Mr. Bernstein was verbally informed that he may have been eligible for a transportation agreement based upon section T3, 2-4c(2) of the Department of the Army Civilian Personnel Regulations (June 28, 1961) which provided as follows:

"In any other case where the individual claims entitlement to return transportation based on United States residence, the oversea command will make a determination, based on all available facts, as to whether such residence had been maintained in fact. Such factors as ownership of property, voting registration, and other specific evidence of continued ties to the United States may be considered for this purpose. Similarly participation in local elections and waiver of United States tax liability based on foreign residence will be considered as forfeiting any claim to bona fide residence in the United States."

Upon receipt of this information, Mr. Bernstein again wrote to a member of Congress and to the Chairman of the Civil Service Commission concerning his eligibility for a living quarters allowance and a transportation agreement. In response to these inquiries, Mr. Bernstein's employing agency recited to him the applicable provisions of the Department of State Standardized Regulations and explained the effect of the above-quoted provisions. Mr. Bernstein was informed that he had been asked by his employing agency to furnish proof of residence and proof that he had filed income taxes for the years 1951 through 1955. Since at that time Mr. Bernstein apparently failed to submit the required evidence, he was advised that he was ineligible for a living quarters allowance and transportation agreement. Evidently, Mr. Bernstein subsequently submitted evidence sufficient to satisfy the requirements of CPR section T3, 2-4c(2) because he was permitted to execute a transportation agreement on July 12, 1966. He did not,

B-187638

however, meet the more stringent requirements for the living quarters allowance, post differential, or other allowances, as prescribed in the Standardized Regulations since it does not appear that such allowances were authorized at that time.

In September 1968, Mr. Bernstein was transferred to Takashiki, Kerama Islands. While stationed at that location, he was paid a foreign post differential and a separate maintenance allowance. The record does not, however, establish the basis on which these allowances were authorized.

Although it is not clear from the record when Mr. Bernstein returned to Okinawa, he was separated from his employment with the Army on August 2, 1969, and, on August 2, 1969, accepted a civilian position with the Marine Corps in Okinawa. Upon his entrance on duty, Mr. Bernstein executed a transportation agreement and, upon application, was authorized a living quarters allowance. The quarters allowance was apparently authorized based on the fact that he had previously received the post differential and separate maintenance allowance. No further administrative investigation was made and Mr. Bernstein received a living quarters allowance until the payment was questioned and terminated effective January 5, 1975.

Upon termination of the improper payment, it was determined that Mr. Bernstein was indebted to the United States in the amount of \$8,296.75, representing the total overpayment from 1969 through 1975. Pursuant to 5 U. S. C. § 5584, Mr. Bernstein requested waiver of this debt. In a letter dated July 14, 1976, our Claims Division denied Mr. Bernstein's request on the grounds that he was at fault for failing to inform the Marine Corps that he had been properly denied a living quarters allowance by the Department of the Army. Mr. Bernstein has appealed that determination to this Office. The statutory authority for our consideration of this request for waiver is found at 5 U. S. C. § 5584, which permits the waiver of a claim of the United States arising out of an erroneous payment of pay and allowances. Under the express terms of the statute, waiver may not be made if there exists, in connection with the claim, an indication of fault or lack of good faith on the part of the employee or any other person having an interest in obtaining the waiver. Therefore, if it is determined that, under the circumstances, a reasonable man would have made inquiry as to the correctness of payment, but the employee did not, then the employee is not

B-187636

free from fault, and the claim against him may not be waived.  
B-168463, June 11, 1969.

Generally, an employee is not without fault when, by reason of his position, experience, knowledge, or service history, he is or should have been aware of an overpayment and taken corrective action. B-174301, October 23, 1971. Thus, where an employee had wide experience of overseas positions, he was charged with imputed knowledge concerning post differentials and, therefore, was denied waiver because he should have known a payment was improper. B-175854, June 1, 1972. Further, the conditions set forth for waiver in the statute and the implementing regulations at 4 C.F.R. 91 et seq. require more than freedom from fault - they impose on the employee an affirmative obligation to inform the proper official of all information relative to the propriety of, or his eligibility for, a payment. B-171891, March 23, 1971. This obligation is not discharged by mere inquiry since in the absence of official notice that the payments were not in error, he cannot reasonably expect to retain excess payments without being obligated to make a refund thereof when the error is corrected. B-171844, March 23, 1971.

In his appeal, Mr. Bernstein has urged several reasons for reversal of the denial by our Claims Division of his request for waiver. First, he states that the former civilian personnel officer at his place of employment recommended that waiver be granted in view of the agency's negligence in authorizing and continuing the payments. Although agency recommendations concerning waiver are not binding on this Office, we note that, contrary to the position taken by the former civilian personnel officer, the Commander of the Navy Accounting and Finance Center has, in a statement dated March 13, 1975, recommended denial of the waiver request.

Mr. Bernstein further contends that he should be granted waiver based on the fact that he had executed transportation agreements with the Army, Navy, and Marine Corps. As noted above, Mr. Bernstein's eligibility for this agreement was evidently determined under the less stringent provisions of section TS 2-4c(2) of the now-superseded Civilian Personnel Regulations. Although that provision was initially carried over to the Joint Travel Regulations, it was eliminated by change 104, effective

B-187636

June 1, 1974. In any event, under the prior provision, an employee's eligibility for a transportation agreement was separate from and not determinative of his eligibility for other allowances. Mr. Bernstein was informed of this fact early in 1966 in a letter from the director of civilian personnel at his headquarters. Accordingly, the fact that Mr. Bernstein executed a transportation agreement may not form the basis for waiver in this case.

Mr. Bernstein additionally states that he believed his local hire status had been changed by reason of the foreign post differential and separate maintenance allowance which he received while stationed at Takashiki. Under the regulations then in effect, an employee who, by reason of his being hired locally, was ineligible for a quarters allowance was likewise ineligible for a separate maintenance allowance and post differential. See Department of State Standardized Regulations section 031.1, 031.2, 031.3 (August 11, 1966). Although Mr. Bernstein had previously been denied these allowances, there is no indication that he questioned the propriety of their payment at that time. Further, although he states that it was his belief that employees eligible for such allowances were also eligible for a living quarters allowance, he evidently did not take action consistent with that belief such as submitting an application for the quarters allowance. Consequently, and by reason of the working knowledge of the regulations expressed by Mr. Bernstein concerning his eligibility in his several inquiries, and in light of the specific information received in response to those inquiries, the above evidence rebuts Mr. Bernstein's contentions that he believed his status as a local hire had been changed. B-176666, December 21, 1973.

Finally, Mr. Bernstein contends that a denial of waiver would not be fair under the circumstances since he would be thus "penalized" for the negligence of Government officials, and that, if he is partially at fault, he should be charged accordingly. However, under the statute, there is no provision for partial waivers based upon comparative fault. 5 U. S. C. § 554(b)(1) provides that the Comptroller General may not exercise his authority to waive any claim if, in his opinion, there exists, in connection with the claim, an indication of, among other things, fault or lack of good faith on the part of the employee. In view of the foregoing, particularly the information officially provided to Mr. Bernstein and his working knowledge concerning eligibility

**B-127636**

for the various allowances, we agree with the determination of our Claims Division that Mr. Bernstein was at fault for his failure to inform the appropriate Marine Corps officials of his prior denial of a living quarters allowance by his previous employer.

Accordingly, we hereby sustain the denial by our Claims Division of Mr. Bernstein's request for waiver of the claim of the United States against him.

**R. F. KELLER**

Acting

**Comptroller General  
of the United States**